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No. 91-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FOOD GIANT, INC.,

Petitioner,

v.

WILLIAM C. PORTER,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a denial of pension benefits occurs years after the effective date of ERISA, is a cause of action based on that denial excepted from ERISA's expansive preemption provision simply because some of the acts or omissions related to that cause of action occurred prior to the effective date of ERISA?

2. When Congress granted the state courts limited jurisdiction concurrent with federal courts under ERISA, whether it intended as part of ERISA's uniform system of pension plan administration that there be consistent and uniform interpretations of the federal substantive law governing such claims?

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Food Giant, Inc. respectfully petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals of Georgia in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 198 Ga. App. 736, 402 S.E. 2d 766 (Pet. App. 1a). The order of the Supreme Court of Georgia denying the petition for certiorari from the Court of Appeals of Georgia (Pet. App. 6a) is not yet reported. The opinion of the State Court of DeKalb County, Georgia (Pet. App. 7a) is unreported.[1]

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[1] The caption in this case lists all parties who were also parties to proceedings in the court whose judgment is sought to be reviewed. The other defendant in the underlying state case, Max Alterman, did not participate in the proceedings before the Georgia Court of Appeals. Petitioner Food Giant, Inc. was formerly a subsidiary of

JURISDICTION

The judgment and opinion of the Court of Appeals of Georgia was entered on February 13, 1991. The petition for certiorari to the Supreme Court of Georgia was denied on May 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISION INVOLVED

This case involves Section 514 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144, which provides in pertinent part:

> OTHER LAWS
>
> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> (b) Construction and application
>
> (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

William C. Porter was employed by Petitioner Food Giant, Inc. or its predecessor company from October 1957

Delhaize the Lion America, Inc., a Delaware corporation. Delhaize the Lion America, Inc. is a subsidiary of Delhaize Freres et Cie, "Le Lion" S.A., a Belgian company. On September 5, 1986, Food Giant was sold to Super Valu Stores, Inc. and later merged into Super Valu (on February 25, 1989). Delhaize the Lion America, Inc. indemnified Super Value against any liabilities that arose prior to the sale, including any liabilities from this case.

until he voluntarily left the employ of Food Giant in July 1970. Porter Dep. at 5-6.[2] From 1970 to 1973, Porter was employed by another company. *Id.* at 12. He returned to Food Giant in February 1973 and remained a Food Giant employee until he again voluntarily left his job in October 1982. *Id.* at 25.

In 1967 Food Giant adopted a defined benefit pension plan for its salaried employees that became effective on April 17, 1967. The 1967 Plan had a provision that provided for full vesting of the benefits only for those employees having 15 years of continuous service. An employee who voluntarily terminated his employment before he was so vested forfeited all service prior to the date of termination. Porter Dep. at 9, 18. Porter was never vested in the 1967 Plan because he left Food Giant with nearly 13 years of continuous service. When he voluntarily left Food Giant in 1970, Porter was aware that he had forfeited all service credit under the 1967 Plan. *Id.* at 12, 18.

Following the enactment of ERISA, Food Giant amended and restated the 1967 Plan. This revised plan, which became effective on April 1, 1976, required that an employee have 10 years of continuous service in order to be fully vested. Porter was never vested in the 1976 Plan because he accumulated only nine years of continuous service, from February 1973 until he again voluntarily left the employ of Food Giant in October 1982. Porter Dep. at 24-25. Under the terms of the 1976 Plan, an employee who voluntarily terminated his employment before he was vested forfeited all service prior to the date of termination.

Despite his almost three-year absence from employment with Food Giant, Porter claims that he is entitled

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[2] "Porter Dep." refers to the deposition of William C. Porter taken on January 19, 1990 in the civil action in the State Court of DeKalb County. It was a part of the record before the court below.

to pension benefits because of an alleged oral promise made in 1973 by Max Alterman, then an officer of Alterman Foods, which was acquired by Food Giant in 1980. Porter Dep. at 28-30. Alterman allegedly promised Porter that if he would return to Food Giant, his prior years of service would be treated as continuous service and, in effect, combined with his future employment for purposes of seniority notwithstanding the Plan's break-in-service provision. Porter Dep. at 16-17. The alleged oral agreement was never committed to writing. *Id.* at 18.[3]

In 1986 Porter filed suit against Food Giant and Max Alterman in the State Court of DeKalb County seeking to recover pension benefits under a state law theory of breach of contract. Food Giant filed a motion to dismiss, contending that Porter's claim was preempted and barred by ERISA, but that motion was denied. Porter then filed an amended complaint, restating his state law claims and adding an alternative claim under ERISA.

The action was removed to the United States District Court for the Northern District of Georgia but then was remanded to state court because Alterman had not joined Food Giant's petition for removal in a timely fashion (Pet. App. 13a). The parties proceeded with discovery and on the basis of Porter's deposition testimony, Food Giant moved for summary judgment. After briefing and argument, the state court found that Porter's state law claims were preempted by ERISA (Pet. App. 8a), dismissed all state law claims against Food Giant and directed entry of final judgment as to those claims (*id.*), making the ERISA claim the only remaining claim against Food Giant (Pet. App. 11a).

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[3] According to Porter, Alterman expressed a strong desire that the alleged oral agreement be kept secret from other employees. Porter therefore agreed to waive the additional vacation time he would ordinarily have been entitled to on the basis of his enhanced seniority in order to avoid making other employees suspicious. Porter Dep. at 16-17, 21-22.

Porter appealed and, by decision of February 13, 1991, the Court of Appeals of Georgia reversed (Pet. App. 1a). It found Porter's state law claims exempt from ERISA's preemptive effect pursuant to the "act or omission" exception to preemption set forth in section 1144(b)(1). The Court of Appeals denied Food Giant's motion for rehearing. Food Giant then petitioned the Supreme Court of Georgia for a writ of certiorari to review the Court of Appeals' decision. The Supreme Court of Georgia denied Food Giant's petition for certiorari on May 15, 1991 (Pet. App. 6a).

REASONS FOR GRANTING THE WRIT

1. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478, 482 (1990); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). As part of this closely integrated regulatory system, Congress expressly included a broadly worded preemption provision to establish employee benefit plan regulation as an exclusively federal concern and to ensure the application of a uniform body of employee benefit law. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484; *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987).

To continue to allow state-based actions after ERISA subjects plan sponsors to the very kind of disruptive burdens, and subjects employee-participants to the uncertain interpretation of federally mandated plan provisions, that Congress sought to foreclose through the preemption provision. Such a result is "fundamentally at odds with the goal of uniformity that Congress sought to implement" in enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484.

2. The eight federal courts of appeals that have considered the issue are in conflict as to the meaning of the narrow exception to the broad preemption provision in-

cluded by Congress in ERISA. The Georgia Court of Appeals selected from among the several possible federal court interpretations one that conflicts with the view of the majority of the federal Circuits and is the least consistent with congressional intent and this Court's rulings that exceptions to federal preemption under ERISA are to be narrowly construed.

The Georgia Court adopted the *ad hoc*, fact-based approach of the First, Second and Ninth Circuits which substantially undermines the uniformity and certainty ERISA was intended to provide. The majority view represented by the Third, Fourth, Fifth, Seventh and Eighth Circuits, on the other hand, narrowly construes the statutory exception to the broad preemption provision of ERISA, as intended, and thus in most cases assures federal preemption. It both provides the certainty intended by Congress and is fair and equitable in its application to employees, employers and plan sponsors.

3. Because ERISA permits state courts limited concurrent jurisdiction with federal courts,[4] several states have also ruled on the meaning of ERISA's preemption provision, each relying on conflicting federal precedent.[5] The decision of the Georgia Court of Appeals has added to the conflicts among the state courts that have considered the preemption provisions and has underscored

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[4] Civil actions brought by a plan participant or beneficiary to recover benefits or employee rights under a plan, or "to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), may be brought in either a federal district court or a state court of competent jurisdiction, which "shall have concurrent jurisdiction of [such] actions." 29 U.S.C. § 1132(e)(1). All other ERISA claims must be brought in a federal district court. 29 U.S.C. § 1132(e)(1).

[5] *See Wayte* v. *Rollins Int'l Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D. 2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

the conflict among the federal Circuits. It further exacerbates the confusion on the meaning of the exception to ERISA preemption.

4. Significantly, the Georgia Court of Appeals decision creates an irreconcilable conflict between the state and federal courts of Georgia. Two different rules of decision regarding the ERISA preemption provision now govern employee benefit disputes in Georgia, thus creating a situation fundamentally at odds with ERISA's purposes. *See Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484. In rejecting the law of its own Eleventh Circuit, the Georgia court has undermined the congressional goals of uniformity, integration, exclusivity and comprehension.[6] It has permitted litigants in Georgia to choose their forum for litigation of employee benefit claims based upon whether state or federal law appears more advantageous. This result is incongruous because the underlying statute was designed to create one substantive law of benefits.

I. THE DECISION OF THE GEORGIA COURT OF APPEALS IS FUNDAMENTALLY AT ODDS WITH THE INTENT OF CONGRESS IN ENACTING ERISA AND WITH EVERY DECISION OF THIS COURT INTERPETING IT.

As this Court has recently reiterated, ERISA is "a comprehensive statute" that sets "uniform standards" and "whose closely integrated regulatory scheme" has among its most "prominent . . . safeguards" a "broad preemption provision." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 90-91. Through ERISA Congress "meant to es-

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[6] While the Eleventh Circuit has not itself considered the matter at issue here, it is bound under *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), by decisions of the Fifth Circuit decided prior to September 30, 1981. The Georgia Court of Appeals expressly declined to follow relevant Fifth Circuit precedent.

tablish pension plan regulation as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). The intent of Congress was "to ensure that plans and plan sponsors would be subject to a uniform body of benefit law" and to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand* v. *McClendon*, 111 S. Ct. at 484.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), therefore preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). This preemption clause "is conspicuous for its breadth." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). Its "deliberately expansive language" was designed to establish pension plan regulation as "exclusively a federal concern." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. at 46.

The legislative history of ERISA makes plain that section 514's "preemptive scope was as broad as its language." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98 (citing H.R. Conf. Rep. No. 93-1280 at 383 (1974); S. Conf. Rep. No. 93-1090 at 383 (1974)). Senator Williams, one of the chief sponsors of the ERISA legislation, stated that with narrow exceptions ERISA was intended to "preempt the field," and the principle of preemption was "intended to apply in its broadest sense." 120 Cong. Rec. 29,933 (daily ed. August 22, 1974) (remarks of Sen. Williams). Senator Javits spoke of "a comprehensive and pervasive Federal interest and the interests of uniformity." 120 Cong. Rec. 29,942 (daily ed. August 22, 1974) (remarks of Sen. Javits). Representative Dent described the reservation to the federal government of the "sole power to regulate the field of employee benefit plans" as

ERISA's "crowning achievement." 120 Cong. Rec. 29,197 (daily ed. August 22, 1974) (remarks of Rep. Dent). *See Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. at 47; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98-100.

To continue to allow litigants to pursue employee benefit plan related claims based on state law after the effective date of ERISA, except in the narrowest of circumstances, would subject plans and plan sponsors to the very kind of "disruptive burdens" that Congress intended to foreclose through the preemption provision. Such a result would be "fundamentally at odds with the goal of uniformity that Congress sought to implement" in enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S. Ct. at 484. Yet that is precisely the impact of the decision of the Court of Appeals of Georgia in this case.

The central issue here was whether a plan administrator's 1982 determination to deny pension benefits escapes ERISA preemption because it was based in part on certain acts that occurred prior to ERISA's January 1, 1975 effective date. The Georgia Court of Appeals held that such pre-ERISA "acts," in this case an alleged formation of an oral contract to ignore a break in service and the alleged reliance on that oral contract, were sufficient to remove a claim from ERISA's jurisdiction and permit suit on the state law breach of contract claim instead.

By reading the exception to the broad preemption provision expansively rather than narrowly, as Congress intended, the Georgia Court of Appeals permitted a plan participant in Georgia to rely on state law and pre-ERISA conduct in adjudicating his pension claim nearly two decades after Congress made pension plan regulation "exclusively a federal concern." *Alessi* v. *Raybestos Manhattan, Inc.*, 451 U.S. at 523. That is not what Congress intended.[7]

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[7] Moreover, Congress specifically addressed the effects of pre-ERISA service and pre-ERISA breaks in service as they relate to

II. THERE IS A CLEAR AND DIRECT CONFLICT AMONG THE CIRCUITS AS TO THE MEANING OF THE EXCEPTION TO THE BROAD FEDERAL PREEMPTION PROVISION ENACTED BY CONGRESS IN ERISA.

Section 514 of ERISA expressly provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This broad preemption provision is modified by a narrow exception: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1).

The federal courts of appeals that have addressed the first part of the exception agree on its meaning: a cause of action arises at the time a claim for pension benefits is denied.[8] The eight courts of appeals that have considered the issue are split, however, on the meaning of the other part of the exception, "any act or omission which occurred" before the effective date of ERISA. The view taken by the Georgia Court of Appeals here and by three of the eight Circuits would make the broad preemption provision of ERISA almost meaningless.

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vesting under a plan subject to ERISA. *See e.g.*, 29 U.S.C. § 1053(b)(1)(C), (F). Indeed, ERISA permits the application of pre-ERISA break in service rules to pre-ERISA breaks. 29 U.S.C. § 1053(b)(1)(F).

[8] *See Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989); *Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1498 (9th Cir. 1984); *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 840 (1st Cir. 1981).

A. The Minority View

The Georgia Court of Appeals in this case rejected the view of its own Circuit—the Eleventh by way of the Fifth—in favor of the minority view adopted by the First, Second and Ninth Circuits.[9] Those Circuits have held that even if a denial of pension benefits occurs after January 1, 1975, thus giving rise to a cause of action after ERISA's effective date, ERISA does not apply and there is no federal court subject matter jurisdiction, so long as any "significant" act or omission related to the denial of benefits took place before January 1, 1975.

In cases where the cause of action arises after the effective date of ERISA, January 1, 1975, these three Circuits inquire whether there were so-called "significant" (sometimes called "critical," "central" or "substantial") acts or omissions that occurred before the effective date of ERISA—or whether there were pre-ERISA acts or omissions that, in the words of some decisions, led "inexorably" to a post-ERISA denial of benefits. These Circuits countenance an *ad hoc*, fact-based analysis concerning what pre-ERISA acts occurred and how significant they were; this in turn determines, years after ERISA's effective date, whether federal or state law applies.

This approach inevitably leads to uncertainty and lack of uniformity in interpreting and applying the comprehensive scheme that is ERISA. A court is forced to speculate in a retrospective analysis what acts are "significant" or "substantial" and what actions led "unambiguously," "inexorably" or "unequivocally" to a denial of benefits.[10] This analysis of intangibles permits a review-

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[9] *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Lamontagne* v. *United Wire, Metal & Plaster Pension Fund*, 869 F.2d 153 (2d Cir.) *cert. denied*, 110 S.Ct. 72 (1989); *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Shatto* v. *Evans Products Co.*, 728 F.2d 1224 (9th Cir. 1984).

[10] Thus, in the First, Second and Ninth Circuits, if a plan containing an "unambiguous" and "nondiscretionary" provision was adopted

ing court to find that although a claim for benefits was not made until after ERISA's effective date, even a secret, oral promise made before January 1, 1975, as here, will preclude ERISA preemption.[11] It substantially undermines the policy choices made by Congress to include certain remedies and exclude others because it permits plan participants and beneficiaries to obtain state law remedies that Congress rejected in enacting ERISA. *See Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 485.

B. The Majority View

Another group of Circuits—consisting of the Third, Fourth, Fifth, Seventh and Eighth [12]—takes the diametrically opposite point of view. They conclude that ERISA nearly always preempts state law if benefits are denied after January 1, 1975. This is because (1) the cause of action arises when the benefits are denied, and (2) the only "significant" or "critical" act is that same denial because it necessarily involves a contemporaneous construction of the plan's provisions. While acknowledging

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before the effective date of ERISA, or if the post-ERISA denial of a claim was the "inevitable result" of "unequivocal pre-effective date interpretations" or "exercises of discretion" under the plan, state law, not ERISA, governs. *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d at 1501-04; *see Quinn* v. *Country Club Soda Co.*, 639 F.2d at 841. In such circumstances, absent diversity of citizenship, these Circuits conclude that the federal courts lack subject matter jurisdiction over such claims.

[11] Furthermore, this approach leaves plan fiduciaries subject to stale claims for many years. It would permit an ERISA claim based upon a denial of benefits after the year 2000 to be preempted as a result of events that occurred in 1973.

[12] *Tanzillo* v. *Local Union 617 Int'l Bhd. of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982); *Winer* v. *Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979).

that the determination of a claim may require the plan trustees to consider pre-ERISA facts or events, including some that may appear substantial or significant, these courts invariably conclude that given Congress' clear intention that ERISA preemption be broadly construed, the ultimate determination by the plan administrator normally must be regarded as the only truly critical act.

The Fifth Circuit also has rejected the minority approach, holding that the "act or omission" exception refers only to those acts or omissions that set in motion legal proceedings other than causes of action, such as "pension-related state administrative proceedings or criminal prosecutions, which certainly cannot be characterized as causes of action." *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d at 971. The Fifth Circuit's rationale is similar to that of the Third, Fourth, Seventh and Eighth: to interpret the "act or omission" to "except from ERISA preemption any suit in which some of the facts occurred prior to 1975, would render the first clause of section 1144(b)(1) superfluous." *Degan* v. *Ford Motor Co.*, 869 F.2d at 894.[13]

The benefits of the majority approach are apparent and completely consonant with congressional intent. First, it assures that ERISA applies and there is full federal preemption of the field as soon as practicable, rather than permitting resort to state law years after ERISA was enacted. Second, it means that the statutory exception to the broad preemption provision of ERISA is construed as narrowly as possible, as Congress intended. Third, this approach provides the kind of certainty of application envisioned by Congress: in most cases the

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[13] On facts very similar to those involved here, Degan was not permitted to rely on Ford's and the union's pre-1975 oral assurances as "acts or omissions" that would exempt his cause of action from ERISA's preemptive reach. *Degan* v. *Ford Motor Co.*, 869 F.2d at 894.

courts need only look at the date of the trustees' determination granting or denying a claim to see if ERISA applies. Finally, it is equitable: it neither requires plan participants to be ever-vigilant in inquiring about plan benefits that may be lost because of the timing of certain "critical acts," nor does it permit discrimination in benefits (which the provisions of ERISA also sought to eliminate) through allegedly secret understandings, like Porter's here, permitting such discrimination.

As the Fourth Circuit explained in *Rodriguez*:

> Such a view fosters the congressional intent "to extend the protections of ERISA . . . as soon as practicable," so as to provid[e] . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). It also promotes Congress' intention that exceptions to ERISA's preemption provisions be narrowly construed. Further, [this] approach has the advantage of certainty. Courts need only look to the date of the trustees' determination to decide whether ERISA applies. Finally, equitable considerations support this standard. Plan participants cannot be expected to inquire about benefits until retirement. Because plan trustees will not act on a participant's claim until it is made, their act of denying a claim will inevitably involve a post-ERISA interpretation of the plan.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72-73 (citations omitted).

The two approaches adopted by the federal Circuits yield decidedly different results. Where there is a denial of benefits based upon a break in service, the minority view considers the pre-ERISA adoption of a break in service provision by the employer and the break in service by an employee as "critical acts" that led "inexorably" to the post-ERISA denial of benefits. Thus, there is no ERISA preemption and no federal court jurisdiction absent diversity. *See Lamontagne* v. *United Wire, Metal &*

Plaster Pension Fund, 869 F.2d at 155-56. Under the same set of facts, the majority view considers the contemporaneous interpretation of the plan's provisions at the time of the post-ERISA denial of benefits as the "critical act." Thus ERISA preemtps the field. *See zillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d at 143-44.

In view of the significance of employee benefit plan regulation to so many individuals, families, employers and plan sponsors, resolution of this conflict by this Court is crucial to the fair resolution of future disputes.[14]

III. THE DECISION OF THE GEORGIA COURT OF APPEALS ADDS TO AND UNDERSCORES THE CONFLICT AMONG THE STATE COURTS ON THE MEANING AND SCOPE OF THE EXCEPTION TO FEDERAL PREEMPTION UNDER ERISA.

The state courts of California, Georgia, New York and Texas [15] have now considered and have reached different conclusions concerning the important federal question as to the meaning of the "act or omission" exception to the

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[14] The split among the circuits will continue to have a significant impact for years to come. As of July 1991, there were approximately 48.5 million working Americans between the ages of 40 and 64. Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Table A-4, at 11 (July 1991). Almost half of those actively working in the private sector as of April 1974 participated in pension plans. S. Schieber, *Trends In Pension Coverage And Benefit Receipt*, at 6 (Employee Benefit Research Institute 1981). Therefore, for at least the next twenty years, millions of workers who were participating in pension plans for a significant period of time prior to the effective date of ERISA will be applying for benefits. The pension entitlements of these beneficiaries may be affected by a wide variety of pre-ERISA acts or omissions.

[15] *See Wayte* v. *Rollins Int'l, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D.2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

broad ERISA preemption provision. Georgia has joined the state courts of California and New York in following the Ninth Circuit's approach, which requires an *ad hoc*, fact-based determination in each case as to whether any "significant" or "critical" acts or omissions occurred before the effective date of ERISA.[16] By contrast, the Texas Court of Appeals has endorsed the views of the Fifth and the Eighth Circuits, finding that the "critical act" is nearly always the denial of benefits.

In addition to adding to the conflict among the states, the decision by the Georgia court means that two different states, Georgia and Texas, within Circuits governed by the same body of precedent[17] have different rules of law on an important federal question. Significantly, the state law conflict between these two states has emerged only in the last several months, with the Georgia court deciding this important federal question in February 1991 (and certiorari being denied by the Supreme Court of Georgia in May) and the Texas Court deciding it in April 1991, thus dramatically underscoring the lack of uniformity and certainty facing plan participants and employers in states within the Fifth and Eleventh Circuits.[18]

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[16] In the view of the New York court, this requires factual distinctions to be made between "significant acts" and relevant but "minor acts." *Grich* v. *Wood & Hyde Leather Co.*, 427 N.Y.S. 2d at 98.

[17] *See* notes 6 *supra* and 20 *infra*.

[18] The Texas Court of Appeals, like the Fifth Circuit in *Degan* and the Georgia court here, was faced with a factual situation involving pre-ERISA oral representations never reduced to writing and not included in the terms of the retirement plan. Unlike the Georgia court, it found the "critical act or omission" to be the denial of benefits. The Texas Court of Appeals concluded that to permit a claimant to rely on such pre-ERISA promises "would render ERISA inapplicable in any case in which some of the facts occurred prior to ERISA's effective date" and "would run counter to congressional intent." *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS at 9-10.

Thus, not only is there serious conflict among the federal Circuits regarding this important federal question, the fact that Congress granted concurrent jurisdiction to the federal and state courts for certain ERISA claims has resulted in the federal conflict being mirrored in the state courts.

IV. THE FAILURE OF THE GEORGIA COURT OF APPEALS TO FOLLOW THE PRECEDENT BINDING ON THE FEDERAL COURTS IN GEORGIA HAS UNDERMINED THE PURPOSES AND POLITICS OF ERISA.

While a state court is not required to follow the law of its Circuit on questions of federal law, the Georgia court's failure to do so in this case is "fundamentally at odds with the goal of uniformity that Congress sought to implement" by enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484.[19] The intent of Congress, after all, was to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government," not to add to them. *Id.* Yet the state courts of Georgia now are bound to follow a rule of decision that applies state law to a large category of claims relating to employee benefit plans and conflicts with binding precedent in the federal courts of Georgia.[20]

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[19] Other state courts have avoided the problem created by the Georgia court by following the interpretation of ERISA adopted by the United States Court of Appeals for the Circuit in which they are located. For example, the Texas court in *Petrolite* adopted a view consonant with decisions of the Fifth Circuit in *Degan* and *Woodfork*, while the California court in *Wayte* adopted the view set forth in decisions of the Ninth Circuit such as *Menhorn*.

[20] While the Eleventh Circuit has not itself considered the matter at issue here, it is bound under *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), by decisions of the Fifth Circuit decided prior to September 30, 1981. The Georgia Court of Appeals specifically rejected the Fifth Circuit's analysis of the ERISA preemption statute as set forth in *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), in favor of the

Henceforth in Georgia, the applicability of ERISA to a post-ERISA claim for pension benefits involving pre-ERISA acts or omissions depends solely on whether the claim is brought in state or federal court. Federal courts sitting in Georgia are bound by the Fifth Circuit's conclusion that the "act or omission" exception does not prevent ERISA preemption and therefore does not oust the federal court of jurisdiction in a case such as this, while a state court sitting literally next door to the federal court will be bound by the Georgia Court of Appeals' contrary holding that a pre-ERISA "act or omission" prohibits the application of ERISA and the exercise of federal jurisdiction. This conflict will undermine the regulatory aims of ERISA in Georgia and employers will be left with continuing uncertainty regarding their obligations and the legal standard that applies to the grant and denial of benefit claims.

The anomalous situation that exists in Georgia, where federal courts are bound by one precedent and state courts by another, inevitably will emerge in other states, further undermining ERISA's purposes and policies. In the absence of a decision by this Court, contrary interpretations by state and federal courts sitting in the same state will have the effect of transforming Congress' grant of concurrent jurisdiction from the mere convenience Congress envisioned into a virtual invitation for litigants to forum-shop between state and federal courts for the interpretation most favorable to their case. Such a conflict completely undermines Congress' stated purpose of achieving uniformity in employee benefit plan administration and creates an inevitable tension between the state and federal courts concerning the appropriate interpretation of an important issue of federal substantive law.

Ninth Circuit's analysis in *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 1991

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

A90A2323, A90A2324

PORTER

v.

FOOD GIANT, INC.; and vice versa

[Feb. 13, 1991]

ANDREWS, Judge.

This appeal arises from the action of Food Giant, Inc. (appellee in Case No. A90A2323 and cross-appellant in Case No. A90A2324), in denying the retirement benefits application of William C. Porter (appellant in Case No. A90A2323 and cross-appellee in Case No. A90A2324). On appeal Porter enumerates as error the award by the Superior Court of DeKalb County, in its order of July 17, 1990,[1] of summary judgment to Food Giant on the basis that Porter's contract and tort claims are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 USC 1001, *et seq.* ("ERISA"). Food Giant enumerates as error the trial court's denial of summary judgment on Porter's claims under the company's pension plans and ERISA, 29 USC 1132 (a)(1) (B).

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[1] The order dismissed Counts 1 and 2 of Porter's amended complaint, alleging breach of contract and vicarious liability on Food Giant's part; and also those portions of counts 6 and 7 which sought attorney fees and exemplary damages for bad faith and aggravating conduct by Food Giant. This order was clarified *nunc pro tunc* in an order entered August 30, 1990.

1. Beginning October 10, 1957, appellant Porter was employed by the predecessor of Food Giant, Inc., Alterman Bros., Inc., in several positions in Alterman Bros.' food retailing business. In July 1970 he voluntarily left Alterman Bros. and shortly thereafter went to work for McCormick Spice Co. In early 1973 he was contacted by Sam Alterman, president of Alterman Bros., regarding the possibility of Porter's rejoining the firm as manager of one of the company's retail stores. Upon Sam Alterman's request, Porter went to the firm's headquarters, where he conferred with Max Alterman, vice-president of the firm, who also served as director of retail store operations and secretary of the firm's retirement program. According to Porter's testimony (subsequently confirmed by Max Alterman in an October 1984 letter to Food Giant's Insurance Director, and also in an affidavit, as well as in his answer to the original complaint), Porter agreed to return to Alterman Bros. on the express condition that his seniority rights be reinstated as if there had been no break in service, with the sole exception that his vacation time would not exceed that granted new employees. Both Porter and Alterman stated that Alterman had requested, during their discussion of these terms of Porter's reemployment, that Porter not mention to fellow employees the restoration of his seniority.

According to the record, Porter immediately tendered his resignation to McCormick and reported for work with Alterman Bros. that same week, on February 15, 1973. In October 1982 he decided once more to leave Alterman Bros. and did so. He subsequently applied for pension benefits based on service of approximately 22½ years. The insurance director of Food Giant, which had acquired Alterman Bros, in the interim, informed him that he was not vested for a pension under either of the company's successive pension plans (1967, 1976). The company subsequently alleged that Porter was also ineligible for retirement benefits under the terms of ERISA, which, it was alleged, had preempted the field.

The code section on which this case must ultimately turn is 29 USC § 1144 (b) (1), which provides: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." In the instant case plaintiff's cause of action—Food Giant's denial of his application for retirement benefits—indisputably accrued after January 1, 1975, and would therefore not come under the "cause of action" exception to ERISA preemption. Porter contends, however, that the "act or omission" exception does not apply to his case, thereby eliminating ERISA, inasmuch as "the substantial conduct [i.e., the 1973 rehiring of Porter and the representations made] forming the basis of the cause of action occurred before January 1, 1975." *Wayte v. Rollins, Int'l.*, 215 Cal. Rptr. 59 (169 Cal. App. 3d 1) (1985), summarizing the Ninth Circuit decisions which the *Wayte* court believed to embody the most reasonable and desirable interpretation of the "acts or omissions" clause.

The federal circuits are divided almost evenly as to the intent and effect of this clause,[2] certain ones of them (e.g., the Fifth Circuit in the 1981 case of *Woodfork v. Marine Cooks and Stewards Union*, 642 F2d 966) holding "act of omission" to be duplicative of, or identical with, "cause of action;" while other circuits consider it to be not mere surplusage (as the reading of Fifth Circuit and its colleagues mandates) but an entirely separate category comprising the pre-emption conduct of which the subsequent (or post-preemption) accrual of the cause of action is "merely the inevitable consequence." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F2d 1496, 1502 (9th Cir. 1984). Food Giant, of course, urges the validity of the former (indeed, this is the entire thrust of the successful motion for summary judgment); Porter argues

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[2] Decisions of federal trial and intermediate courts are not binding on this court, only persuasive. *Felker v. State*, 252 Ga. 351, 361 (1b) (314 SE2d 621) (1984).

that the cases in the latter category embody the proper interpretation of the "acts or omissions" language and advance the dual intent of the legislation itself, i.e., not only to provide a set of uniform criteria for determining employee benefit plan issues, but also to prevent cluttering the federal court calendar with cases not properly or necessarily within federal courts' jurisdiction. See e.g., *Wayte*, supra.

It is contrary to the generally accepted principles for construing statutes to "read out" any part of the statute as "mere surplusage" unless there is a clear reason for doing so. See, e.g., OCGA § 1-3-1; *Exum v. City of Valdosta*, 246 Ga. 169 (269 SE2d 441) (1980). The cause of action accrues when the formal act of denial takes place, e.g., *Menhorn*, supra at 1498 (1); the "acts or omissions" which are the basis of the cause of action may have occurred at any prior time, either before or after the preemption date, January 1, 1975. See, e.g., *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537 (9th Cir. 1980) (the only act subsequent to the preemption date was the formal act of denial); *Wayte*, supra at 67 (state court jurisdiction and application of state law not defeated because cause of action accrued after effective date if such causative factors as exhaustion of administrative remedies occurred before that date); *Menhorn*, supra (legislative history shows legislative intent, as both "cause of action" and "acts or omissions" clauses appear in Conference Committee Report); *Cowan v. Keystone Employee Profit-Sharing Fund*, 586 F2d 888 (1st Cir. 1978) (1977 denial of application for benefits allegedly underpaid in 1974 held erroneous because of "acts or omissions" clause). See also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (107 SC 2211, 96 LE2d 1) (1987); *Jameson v. Bethlehem Steel*, 765 F2d 49 (3d Cir. 1985); *Lafferty v. Solar Turbines Intl.*, 666 F2d 408, 410 (9th Cir. 1982).

Although Food Giant offers persuasive arguments, we are reluctant to conclude, as we must to adopt that posi-

tion, that Congress did not intend every part of the statute, as finally written, to have effect. We therefore hold that, under the plain language of the statute, the acts or omissions giving rise to the cause of action occurred in 1973, when Alterman induced Porter to return to Food Giant's employ by promising him that his full seniority rights (with the single exception noted above) would be restored and that the "acts or omissions" from ERISA clearly applies. Under the criteria of OCGA § 9-11-56, the trial court's award of summary judgment on the basis of ERISA preemption was therefore error and the judgment in Case No. A90A2323 must be reversed.

2. Our holding in Division 1, supra, renders moot that portion of appellee's enumeration which pertains to ERISA. As to that portion which addresses Porter's state law claims, we find that these issues do not meet the criteria for summary adjudication. The judgment in Case No. A90A2324 must therefore be affirmed.

Judgment reversed in Case No. A90A2323. Judgment affirmed in Case No. A90A2324. Pope and Beasley, JJ., concur.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 15, 1991

Mr. Christopher S. Miller
Troutman, Sanders, Lockerman & Ashmore
127 Peachtree Street
Atlanta, Ga 30043

Case No. S91CO793

FOOD GIANT, INC. V. WILLIAM C. PORTER

COURT OF APPEALS CASE NO. A90A2323

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS
Clerk

APPENDIX C

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action File Number 86A-27012-3

WILLIAM C. PORTER,
Plaintiff

vs.

FOOD GIANT, INC., and MAX ALTERMAN,
Defendants

FOOD GIANT, INC.,
Cross-Claim Plaintiff,

vs.

MAX ALTERMAN,
Cross-Claim Defendant

ORDER

The above-styled case came on for oral argument before the Court on April 6, 1990 on DEFENDANT FOOD GIANT, INC.'s MOTION FOR SUMMARY JUDGMENT. The parties appeared through counsel and presented argument for the Court's consideration. And the Court, having given extensive time and thought to the arguments and citations presented by the parties, and after a thorough review of the record, hereby finds as follows:

The Court has again read the myriad of cases which were presented in March, 1988 both in support of and in

opposition to this Defendant's Motion to Dismiss. Subsequent to that prior motion the Court has now had the benefit of additionally persuasive, if not controlling, federal case law to consider. Particularly, *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989) and *Degan v. Ford Motor Company*, 869 F.2d 889 (5th Cir. 1989). In addition, the Court relies on *Time Insurance Company, Inc. v. Roberts et al.*, 191 Ga. App. 766 (1989) in finding that it appears that the Plaintiff's complaint relates to an employee welfare benefit plan as defined under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, that the cause of action upon which this Plaintiff sues is post January 1, 1975, and that said action against Defendant Food Giant, Inc. is therefore preempted by ERISA.

Having found that Plaintiff's claims against Defendant Food Giant, Inc. are preempted by ERISA, this Court further finds that it has jurisdiction over Plaintiff's claims only in so far as he is entitled to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B).

Accordingly, the Court hereby DISMISSES COUNT ONE and COUNT TWO and those portions of COUNT SIX and COUNT SEVEN as to relief requested from Defendant Food Giant, Inc.

The Court expressly determines that there is no just reason for delay and expressly directs entry of a final judgment as to the above dismissal pursuant to O.C.G.A. § 9-11-54(b).

It further appears to the Court that there are genuine issues of material facts unresolved as to the Plaintiff's claim against Food Giant, Inc. that remains within the jurisdiction of this Court and that Defendant Food Giant, Inc. is not entitled to a judgment as matter of law. Accordingly, Defendant's Motion is DENIED.

DEFENDANT MAX ALTERMAN'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF and CROSS-CLAIM DEFENDANT MAX ALTERMAN'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIM OF DEFENDANT FOOD GIANT, INC. are hereby set for oral argument on September 5, 1990 beginning 1:00 p.m. in Room 606 of the DeKalb County Courthouse.

IT IS ORDERED.

This 16th day of July, 1990.

/s/ Anne Workman
ANNE WORKMAN
State Court of DeKalb County
Judge

APPENDIX D

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action File No. 86A-27012-3

WILLIAM C. PORTER,
Plaintiff,

v.

FOOD GIANT, INC., and MAX ALTERMAN,
Defendants.

FOOD GIANT, INC.,
Cross-Claim Plaintiff,

v.

MAX ALTERMAN,
Cross-Claim Defendant.

ORDER

By Order dated July 16, 1990 and filed with the Clerk on July 17, 1990, this Court granted in part Defendant Food Giant, Inc.'s Motion for Summary Judgment and dismissed Count One and Count Two of Plaintiff's Amended and Recast Complaint, as well as Count Six and Count Seven as to relief requested from Defendant Food Giant, Inc. The Court directed that final judgment be entered as to said dismissals pursuant to O.C.G.A. § 9-11-54(b).

The Court's July 16, 1990 Order also held that Defendant Food Giant, Inc. was not entitled to summary judgment as to Count Three, which the Court found to be governed by the federal Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1132(a)(1)(B). Pursuant to the Court's Order, this claim under ERISA is the only remaining claim against Defendant Food Giant, Inc.

Food Giant's motion for summary judgment also raised the issue of whether Plaintiff was entitled to a trial by jury on a claim arising under ERISA. The Court's July 16, 1990 Order did not expressly address this issue. In light of the Court's ruling that Plaintiff's only remaining claim is governed by ERISA, the Court now rules that Plaintiff is not entitled to have this claim tried to a jury as a mater of right. *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525 (11th Cir. 1990) and cases cited therein. The Court also rules that it is within this Court's discretion to allow the case to be tried to a jury pursuant to O.C.G.A. § 9-11-39(b).

As Notices of Appeal and Cross-Appeal of the Court's July 16, 1990 Order have been filed, the Court believes that it would benefit all concerned if the issues addressed above, which were properly before the Court at the time the July 16, 1990 Order was entered, were presented to the Court of Appeals along with all other matters ruled upon in the Court's July 16, 1990 Order. As Plaintiff's costs of appeal are being paid contemporaneously with the entry of this Order and Defendant Food Giant, Inc.'s costs of cross-appeal have not yet been paid, this Court retains jurisdiction to amend the July 16, 1990 Order.

Therefore, the Court's July 16, 1990 Order is amended to incorporate the rulings set forth above. The remainder of that Order is unaffected by this amendment. The Court further directs that the amendment set forth above be entered *nunc pro tunc*, provided that such entry

is not construed as precluding any party's right to appeal as to any issue addressed in the Court's Amended Order.

SO ORDERED this 30th day of August, 1990, *nunc pro tunc*, July 16, 1990.

State Court of Dekalb County

/s/ Anne Workman
ANNE WORKMAN
Judge

ORDER PREPARED BY:

/s/ Christopher S. Miller
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APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C87-222A

WILLIAM C. PORTER,
Plaintiff,

vs.

FOOD GIANT, INC. and MAX ALTERMAN,
Defendants.

ORDER

This action is before the court on Plaintiff's motion to remand and on Defendant Food Giant's motion to dismiss. Plaintiff has also moved for leave to file a supplemental response to Defendant's motion to dismiss and requests that the court defer ruling on the motion to dismiss.

Plaintiff William Porter originally brought this action alleging a breach of contract claim in DeKalb County, Georgia. Porter alleged that Defendants Food Giant, Inc. ("Food Giant"), his former employer, and Max Alterman, a Food Giant agent, breached his employment contract. Plaintiff had worked for Food Giant from 1957 until 1970. In 1973, he returned to work for Food Giant and remained there until 1982. Plaintiff claims that in 1973, Max Alterman promised him that if he returned to work for Food Giant, he would receive retirement benefits as though he had not interrupted his service with Food Giant. Plaintiff claims that Defendants have breached this agreement.

Defendant Food Giant was served on October 6, 1986 and filed its answer October 30, 1986. Defendant Max Alterman filed his *pro se* answer admitting the averments of the complaint on October 14, 1986. Defendant Food Giant also filed a motion to dismiss, arguing in part that Plaintiff's claim is preempted by Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* On January 23, 1987, Plaintiff amended his complaint to add a second claim based on ERISA. On February 9, 1987, Defendant Food Giant petitioned for removal and the action was removed to this court. Defendant Food Giant has renewed its motion to dismiss in this court. On March 23, 1987, Defendant Food Giant amended its removal petition by joining Max Alterman in the petition.

Plaintiff has moved to remand the action to state court on the grounds that Defendants' removal petition was untimely filed in February 1987 because the original complaint had been served October 6, 1986. Plaintiff also maintains that the removal petition was faulty because Max Alterman did not timely join the petition. Defendant Food Giant opposes the motion to remand arguing that the removal petition was timely because the action could not have been removed until Plaintiff amended the complaint to add an ERISA claim. Food Giant also argues that the removal was not flawed by Alterman's untimely joinder in the petition since it claims Alterman is not an indispensable party who must timely join the petition.

28 U.S.C. § 1446(b) provides that a removal petition must be filed within thirty days of defendant's receipt of the complaint, or if the initial pleading is not removable, within thirty days of defendant's receipt of an amended pleading from which it can be ascertained that the action is subject to removal. Plaintiff claims that the action should have been removed within thirty days of October 6, 1986 since the complaint was subject to

an ERISA preemption defense. Food Giant maintains that the action could not be removed until the complaint was amended to include an ERISA claim.

It is well-settled that an action may be removed to federal court when there is a federal question on the face of plaintiff's well-pleaded complaint. *Gully v. First National Bank*, 299 U.S. 109 (1936); *First Federal Savings & Loan Association of Lake Worth v. Brown*, 707 F.2d 1217, 1220 (11th Cir. 1983). Furthermore, a defense that a plaintiff's state law claim is preempted by ERISA does not provide the basis for removal when the complaint contains no federal question on its face. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983). Since Food Giant's preemption defense does not establish the basis for removal, the action could not be removed until Plaintiff amended to add an ERISA claim on January 23, 1987. Therefore, Defendant Food Giant's February 9, 1987 petition for removal was timely filed.

Even so, Plaintiff has argued that the petition is flawed because Max Alterman did not timely join the removal petition. Nominal parties, unlike indispensable parties, need not join a removal petition and a nominal party is one in whose absence the court can enter final judgment "consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff." *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressman and Assistants' Local 349*, 427 F.2d 325, 327 (5th Cir. 1970).

Plaintiff seeks relief from Max Alterman in both counts of his complaint. Therefore, Alterman clearly has an actual interest in the outcome of this litigation and cannot be classified a nominal party under *Tri-Cities*. As such, he must timely join the petition for removal. Id., at 327. Since he has not done so, the petition for removal is defective and the action is remanded to state court.

Accordingly, it is not necessary to consider Defendant Food Giant's motion to dismiss or Plaintiff's motions for leave to file a supplemental response to Defendant's motion to dismiss and to defer ruling on the motion to dismiss.

Plaintiff's motion to remand is GRANTED. Defendant's motion to dismiss and Plaintiff's motions for leave to file a supplemental response and to defer ruling on the motion to dismiss are DENIED as MOOT.

SO ORDERED, this 24 day of April, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge